IN THE COURT OF APPEALS OF THE STATE OF ALASKA

NATHAN JOHN GARCIA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12177 Trial Court No. 3AN-12-10132 CR MEMORANDUM OPINION No. 6696 — August 29, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Marilyn J. Kamm, Attorney at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

The Anchorage police searched Nathan John Garcia incident to arrest and found cocaine in his pockets, some of which was wrapped in bindles. Based on this episode, Garcia was convicted of possessing cocaine with intent to deliver. Garcia appeals his conviction, arguing that the officers lacked probable cause to arrest him and

that the trial court erred in declining to suppress the evidence seized pursuant to his arrest.

Garcia also argues that the trial court erred in rejecting two mitigating factors at sentencing — that his conduct was "among the least serious" within the definition of the offense and that the harm caused by his commission of this offense, and any previous offenses, was "consistently minor and inconsistent with the imposition of a substantial period of imprisonment."[1]

For the reasons explained in this opinion, we reject these claims and affirm Garcia's conviction and sentence.

Underlying facts

In September 2012, a confidential informant contacted the Anchorage Police Department and offered to arrange a drug buy with a man she knew as "Nate." The informant said that Nate was a fifty- to sixty-year-old Hispanic male who lived in Room 131 of the former Inlet Inn and that he was the middleman between the informant and the drug supplier. The informant also gave the police Nate's phone number.

The informant told police that she had purchased crack cocaine over a number of years from Nate, and that each of her previous transactions with him followed the same pattern. The informant would meet Nate in Room 131 of the Inlet Inn and pay him; she would then wait in the room while Nate left to meet with his supplier. Nate would return with the drugs about fifteen minutes later.

Using a database called Tiburon, the police determined that Nate's phone number was associated with a man named Nathan Garcia. The police presented the informant with a photograph of Garcia that was on file with the state Division of Motor

[1] AS 12.55.155(d)(9) & (d)(12), respectively.

Vehicles (DMV), and the informant confirmed that Garcia was the person she knew as "Nate."

Based on this information, the police had the informant set up a buy with Garcia. The informant texted Garcia at the same phone number that she had provided to the police and arranged to buy eight grams of cocaine from him for $800 the next day.

The informant continued to exchange text messages with Garcia up until their meeting the next day. Anchorage Police Officer Mark LaPorte drove the informant to the Inlet Inn and personally viewed (and photographed) these text messages. Once at the Inlet Inn, Officer LaPorte gave the informant the buy money and watched as she entered the lobby.

A few minutes later, Garcia exited the Inlet Inn and walked south before being picked up by a driver in a white Pontiac. The driver, a man whom one of the officers recognized from a previous drug investigation, drove Garcia around the block and out of sight, and then returned to drop Garcia off several minutes later.

Anchorage Police Officer Clinton Peck testified that he approached Garcia as Garcia walked back toward the hotel. Officer Peck introduced himself as a police officer and told Garcia to stop. Instead, Garcia tried to run away. Officer Peck forced Garcia to the ground and told him he was under arrest.

Officer Peck asked Garcia if he was carrying any weapons or drugs. Garcia said that he had something in his right pocket. Officer Peck then found twenty bindles of cocaine in Garcia's right jacket pocket and another three unwrapped cocaine "rocks" in a different pocket.

Procedural history

The State charged Garcia with one count of third-degree misconduct involving a controlled substance (possession of cocaine with intent to deliver) and one count of fourth-degree misconduct involving a controlled substance (possession of cocaine).[2] Before trial, Garcia moved to suppress the physical evidence gathered from his arrest, arguing that the police lacked probable cause to arrest him.

The superior court denied the motion. In its order, the court found that the informant's information "was sufficiently detailed and substantially independently corroborated," thus satisfying the two prongs of the *Aguilar-Spinelli* test.[3]

A jury subsequently found Garcia guilty of both counts. At sentencing, the court merged the two counts into a single conviction for third-degree controlled substance misconduct. Because Garcia was a third felony offender, he faced a sentencing range of 6 to 10 years for this class B felony.[4] The court found one proposed aggravator — that, under AS 12.55.155(c)(15), Garcia had three or more prior felony convictions — and declined to find Garcia's requested mitigators. The court imposed a sentence of 6 years flat.

Garcia now appeals.

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[2] Former AS 11.71.030(a)(1) (2012) and former AS 11.71.040(a)(3)(A) (2012), respectively.

[3] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *see State v. Jones*, 706 P.2d 317, 324-25 (Alaska 1985) (holding that, as a matter of state law, the *Aguilar-Spinelli* test continues to govern the evaluation of hearsay information offered to support a search or seizure).

[4] Former AS 11.71.030(c) (2012); former AS 12.55.125(d)(4) (pre-July 2016 version).

Why we conclude that the officers had probable cause to arrest Garcia

In Alaska, a police officer may make a warrantless arrest if the officer has "probable cause to believe that a felony has been committed and a reasonable belief that the person to be arrested is the one who committed it."[5] Probable cause is an objective determination and can be based on "reasonably trustworthy information provided by an informant."[6] To establish that the information provided by a police informant is "reasonably trustworthy," the State must demonstrate both the basis of the informant's knowledge and the informant's reliability.[7]

Here, the informant's tip was based on personal knowledge — the informant's past experiences buying drugs from Garcia. This satisfied the first prong of the *Aguilar-Spinelli* test.[8]

The next question is whether the State satisfied the second prong — *i.e.*, whether the State showed that the informant was a reliable source of information. Garcia argues that this prong was not satisfied because, while his conduct that day may have been suspicious, it was "not all that uncommon," and because the police did not meaningfully corroborate any information by the informant sufficiently indicative of criminality.[9]

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[5] *Erickson v. State*, 507 P.2d 508, 517 (Alaska 1973); *see also* AS 12.25.030(a)(3).

[6] *Duncan v. State*, 178 P.3d 467, 470 (Alaska App. 2008) (citation omitted).

[7] *See Hart v. State*, 397 P.3d 342, 344 (Alaska App. 2017) (applying the *Aguilar-Spinelli* test in the search warrant context); *see also Schmid v. State*, 615 P.2d 565, 574-75 (Alaska 1980) (applying the *Aguilar-Spinelli* test in the warrantless arrest context).

[8] *See Stam v. State*, 925 P.2d 668, 670 (Alaska App. 1996).

[9] *See Carter v. State*, 910 P.2d 619, 624 (Alaska App. 1996) ("Although information (continued...)

We disagree. Prior to Garcia's arrest, the police corroborated several aspects of the informant's claims. The police matched the phone number of "Nate" to a number associated with Nathan Garcia and confirmed with the informant, through use of a DMV photo, that Nate and Garcia were the same person. While the police were monitoring the Inlet Inn, Garcia appeared at the time and place where the informant had set up the controlled buy, and he then proceeded to do exactly what the informant said Nate had done during previous transactions. In short, the informant predicted Garcia's future conduct, and this conduct was then corroborated by the police.[10]

Garcia suggests that the police only corroborated public or wholly innocuous facts and did not corroborate that Garcia was involved in drug sales. But the police did more than confirm Garcia's identity and his residence. They corroborated the details of Garcia's pattern of drug sales, as alleged by the informant.

Additionally, Officer LaPorte directly observed the text messaging between the informant and Garcia arranging the drug transaction. Garcia argues that the police knew only that Garcia was "associated" with that phone number in Tiburon and did not know if he was the actual owner or subscriber of that number. But probable cause "requires only a fair probability or substantial chance of criminal activity, not an actual

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[9] (...continued)
corroborating a confidential informant's tip need not be independently incriminatory, . . . it must relate to the tip in some way that lends credibility to the report of illegality.") (citations omitted).

[10] *See Kralick v. State*, 647 P.2d 1120, 1124-25 (Alaska App. 1982) (holding that an informant's tip, though anonymous, was sufficiently corroborated by independent police observations to reasonably conclude that the informant's information was reliable).

showing that such activity occurred."[11] We agree with the trial court that, given "the situation in its entirety," the police had probable cause to arrest Garcia.

Accordingly, we affirm the denial of Garcia's motion to suppress.

Why we affirm the trial court's denial of the "least serious" conduct mitigator

Garcia argues that he established the "least serious" mitigator under AS 12.55.155(d)(9) — that his conduct was "among the least serious conduct included in the definition of the offense" of third-degree misconduct involving a controlled substance. Under the governing law at the time Garcia committed this offense, a person was guilty of third-degree misconduct involving a controlled substance if the person manufactured or delivered any amount of a schedule IIA or IIIA controlled substance, or possessed any amount of any of these substances with the intent to manufacture or deliver.[12] Cocaine is a schedule IIA drug.[13]

The superior court declined to find the "least serious" mitigator.

On appeal, Garcia challenges several aspects of the trial court's decision. First, Garcia argues that the trial court improperly relied on its past experiences presiding over drug prosecutions to conclude that Garcia was "a low-end drug dealer — [at the] low end of the supply chain." But Garcia's conviction already established that he intended to distribute cocaine. We fail to see how a finding that his drug distribution was on the "low end" undermined Garcia's request for the "least serious" mitigator.

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[11] *State v. Joubert*, 20 P.3d 1115, 1119 (Alaska 2001) (quoting *Van Sandt v. Brown*, 944 P.2d 449, 452 (Alaska 1997)).

[12] *See* former AS 11.71.030(a)(1) (2012).

[13] AS 11.71.150(c).

Ultimately, the trial court rejected the mitigator, *despite* the low-end nature of the transaction, because the court found that the total quantity of drugs was not "an unusually or distinctively minimal amount" and that the nature of the transaction itself did not place it among the least serious conduct within the definition of the offense. Garcia argues that the court incorrectly concluded that the least serious conduct mitigator required a finding of a "small quantity" of drugs, which constitutes a separate mitigating factor.[14] But we do not interpret the court's ruling as giving dispositive weight to this factor. Rather, the court relied on it as one of several factors.

Second, Garcia argues that the trial court placed too much emphasis on the fact that the cocaine was packaged into bindles, some of which he intended to distribute and some of which he intended to keep — facts that, according to Garcia, "do not mean that Garcia did not qualify for the least serious conduct mitigator." But the fact that the packaging did not preclude the application of the "least serious" mitigator did not mean that Garcia met his burden of proving the mitigator by clear and convincing evidence.[15]

We note that the record indicates that Garcia had a history of selling drugs to the informant. In a text message to Garcia prior to the controlled buy, the informant justified the unusual size of her order by explaining to Garcia that she was "picking up for a few people." The fact that the informant needed to explain her atypically larger order underscores that the transaction in this case was not an isolated incident.[16] The text

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[14] AS 12.55.155(d)(13).

[15] AS 12.55.155(f)(1).

[16] *See Jones v. State*, 771 P.2d 462, 466 (Alaska App. 1989) (holding that the trial court could properly reject "least serious" mitigator given facts indicating that Jones was involved in frequent drug transactions); *cf. McReynolds v. State*, 739 P.2d 175, 180 n.4 (Alaska App. 1987) (noting that "a characteristic case of sale or possession for sale of controlled (continued...)

message further suggests that Garcia planned to sell the drugs to the informant, even knowing that she intended to redistribute the drugs to multiple people.

Finally, Garcia argues that his conduct satisfied the mitigator because former AS 11.71.030(a)(1) (the statute under which he was convicted) encompasses conduct that is far more severe. But the fact that Garcia's conduct might not qualify as "among the most serious" within the definition of the offense does not necessarily mean that his conduct qualified as "among the least serious."

Ultimately, we are not persuaded that Garcia met his burden of showing by clear and convincing evidence that his conduct was among the least serious conduct included in the definition of the offense. For these reasons, we affirm the trial court's denial of the (d)(9) mitigator.

Why we affirm the trial court's denial of the "consistently minor harm" mitigator

Garcia also argues that he established the mitigating factor under AS 12.55.155(d)(12) — that the facts surrounding his commission of this offense, and his previous offenses, showed that the harm caused by his conduct is "consistently minor and inconsistent with the imposition of a substantial period of imprisonment." Unlike the least serious conduct mitigator, which is concerned primarily with the nature of a defendant's conduct, the consistently minor harm mitigator focuses on the *consequences* of a defendant's conduct.[17] Accordingly, courts considering this mitigator must weigh

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[16] (...continued)
substances involves an offender who is engaged in ongoing transactions on a commercial basis") (citing *Lausterer v. State*, 693 P.2d 887, 891 (Alaska App. 1985)).

[17] *Simants v. State*, 329 P.3d 1033, 1037 (Alaska App. 2014).

both the physical injuries and property losses associated with each crime and the "risks . . . [and the] disruption of the social fabric that the defendant's criminal conduct entailed."[18]

At the time he committed this offense, Garcia had five prior felony and six prior misdemeanor convictions. In support of the "consistently minor harm" mitigator, Garcia relied primarily on information contained in two presentence reports — the presentence report for this case and a presentence report related to his most recent prior felony case (from which three of the five felony convictions arose). The presentence reports contained brief explanations of the facts surrounding Garcia's prior felony convictions, but the reports only contained background facts for one of Garcia's six misdemeanor convictions.

The superior court found that Garcia's current offense could qualify as "minor" for purposes of the mitigator. But the court concluded that it lacked sufficient information about Garcia's prior convictions and the harm resulting from those convictions — and that Garcia had therefore failed to meet his burden of establishing the mitigator.

We cannot fault the trial court for reaching this conclusion in light of the information before it.[19] While all of Garcia's prior felony convictions were for property crimes, his misdemeanor convictions represented a mix of offenses — property offenses,

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[18] *Joseph v. State*, 315 P.3d 678, 684 (Alaska App. 2013) (quoting *Ison v. State*, 941 P.2d 195, 198 (Alaska App. 1997)).

[19] *See Mancini v. State*, 841 P.2d 184, 188 (Alaska App. 1992) (holding that, "[w]hile the totality of the information tended to indicate that Mancini's past crimes were not particularly serious," the trial court did not err in concluding that Mancini's reliance on the minimal information contained in the presentence report "fell considerably short of clear and convincing proof that Mancini's past crimes had caused harm that was consistently minor").

a weapons offense, a conviction for failure to appear, and two driving convictions. The trial court had little to no information about these offenses.

Moreover, as noted earlier, the trial court found one aggravating factor — that under AS 12.55.155(c)(15), Garcia had three or more prior felony convictions. The trial court stated that even if Garcia had established the "consistently minor harm" mitigator, the court would not give it any weight in light of the (c)(15) aggravator.

Garcia contests this finding, arguing that the legislature did not intend that the (d)(12) mitigator would be automatically unavailable to a defendant with three or more felony convictions. But we do not interpret the court as making a categorical ruling precluding application of the mitigator under these circumstances. Rather, the court made a finding regarding the relative weight of this aggravator and this mitigator in light of Garcia's particular criminal history, which the court noted began when Garcia was in his forties and resulted in a succession of felony offenses. Given the facts before the court, the court could reasonably determine that, even if the harm caused by Garcia's offenses was consistently minor, this was balanced out by the fact that Garcia had three or more prior felony convictions.[20]

We therefore affirm the trial court's rejection of the (d)(12) mitigator.

Conclusion

We AFFIRM the judgment of the superior court.

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[20] *See Jones v. State*, 771 P.2d 462, 466 (Alaska App. 1989). Garcia also argues that his prior felony theft convictions would now be charged as misdemeanors. But at least two of his prior convictions remain felonies under Alaska law. *See* AS 11.46.130(a)(3) (property taken from the person of another); AS 11.46.130(a)(7) (theft of an access device).